AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	:	
	:	AAA Case No.
Between	:	01-14-0000-8975
	:	
CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
"City"	:	Re: Discharge of Barry Delagol
- and -	:	
	:	Hearing: February 3, 2015
	:	
F.O.P, LODGE NO. 5,	:	
	:	
"Union"	:	

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Brian Pierce, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer Barry Delagol effective June 7, 2013. It did so based upon charges of "Conduct Unbecoming" and "Neglect of Duty." These charges, which allege violations of Police Department Disciplinary Code Sections 1-§018-10 (Sexual behavior while on duty) and 5-§006-10 (Failure to conduct a proper, thorough, and complete investigation), arose from Delagol's actions during and after a traffic stop he conducted on September 30, 2012. (Joint Exhibits 2 & 3.) Although the Union does not contest the underlying facts, it contends the City lacked just cause to discharge Delagol. It asks that Delagol be reinstated to his former position and be made whole for all pay and benefits lost as a consequence of his discharge, less the period of an appropriate disciplinary suspension. It also requests that the City be directed to revise Delagol's personnel records to reflect this modification of the discipline imposed.

The basic facts of this case, which are largely undisputed, may be set forth succinctly.

At the time of his discharge, Delagol had been a member of the City's Police Department (the "Department") for fifteen years, and was assigned to the Canine Unit.[1] He has no record of prior discipline.

The events leading to Delagol's discharge took place on September 30, 2012.

Lieutenant George Mullen, a member of the Department's Internal Affairs Division ("IAD"), testified that on October 1, 2012, he was assigned to investigate a rape allegation involving an unknown City Police Officer that was received the prior day. The

[1] The Notice of Dismissal identifies Delagol's date of appointment to the Department as being January 26, 2004. (Joint Exhibit 2.) However, the City did not challenge nor seek to rebut Delagol's testimony that his tenure with the Department dates to 1998.

complainant, MH, reported that at approximately 2:00 a.m. on September 30, 2012, she had been stopped by a uniformed police officer in a marked patrol car while driving in the area of Wellington and Erdick Streets.[2] She recounted that the officer directed the two unknown males that were passengers in her car to exit the vehicle and leave the area on foot. According to MH, after parking her car, the officer drove her home in the patrol vehicle, and then escorted her into the residence where he allegedly raped her.

Mullen detailed that with MH unable to provide more than a vague description of her alleged attacker, the Special Victims Unit detective working the case with him reviewed Department records to determine whether any officer had run a check on either MH or her vehicle's tags on September 30, 2012. This examination, he related, revealed that Delagol had done so. With this information, Mullen reported obtaining and executing several search warrants, which led to the seizure of various items from Delagol's home and work locker, as well as taking a DNA sample from him. A subsequent comparison of Delagol's DNA sample with the semen collected from MH as part of the rape kit was positive.

Mullen recounted that during a December 27, 2012 interview, Delagol acknowledged engaging in sexual activity with MH on September 30, 2012, but maintained it was consensual.[3] According to Mullen, Delagol reported that he stopped MH's vehicle early that morning after she had run a red light with her car and nearly struck his vehicle. Although he conceded that the stop should have been recorded on his patrol log and a 75-48A form, he explained that he did not do so because MH had stated

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[2] To maintain the complainant's privacy, I will identify her here by initials only.

[3] Mullen reported that Delagol's interview had to be delayed until the District Attorney gave notice that his office was declining to proceed with criminal charges against Delagol based upon this incident.

her father was a police officer in a neighboring township. Mullen recalled that Delagol stated that since MH had been drinking, although not intoxicated, he agreed to drive her home as a courtesy given her father's status as a police officer. Upon arriving there, at MH's request, he escorted her from the vehicle to the residence. Delagol related that when they reached the front door, she hugged him and then pulled him inside, where they engaged in sexual relations.

Mullen recounted that upon further questioning, Delagol also confirmed that he had had failed to radio and report his transporting of MH to her home. Mullen explained that under Department policy, a police officer, when transporting a minor or female civilian in his/her patrol car, must notify Police Radio that he is doing so and report his/her vehicle's mileage at the beginning and conclusion of the trip.

Mullen averred that his investigation substantiated that Delagol had engaged in sexual intercourse with MH while on duty and had failed to document the vehicle stop and record transporting MH to her home. In addition, he found that MH's allegation of a sexual assault could not be sustained. (City Exhibit 1.)

In his testimony, Delagol confirmed the details of his encounter with MH, which was consistent with his prior statement, as reported by Mullen.

In explaining his actions, he stated that although MH did not appear intoxicated, he did not want her driving because he was not documenting the stop and did not want anything "to come back on him" as result. He recalled initially asking MH if she and her two male passengers could walk home, and MH replying that she was uncomfortable doing so because she had only just met them. When she was unable to contact anyone via her cell phone to pick her up, he stated that after initially declining her requests, he

eventually agreed to drive her home. He also reported that before departing from the location of the stop, he received and accepted a radio call for a K-9 unit to perform a building search in the western part of the City.

Delagol acknowledged that he did not document stopping MH's vehicle or transporting her home. He explained that although "not by the book," he had been "taught" that you do not document stopping a police officer or members of his/her family.

Delagol recalled that when they arrived at MH's home, she asked to be escorted to the door. After initially refusing, he acceded to her repeated requests. According to Delagol, when they reached the door to her residence, she hugged him, and then pulled him inside and began kissing him. He described pushing her away, but stated she persisted in kissing him, and then "it escalated to sex." He stated that when they had concluded, he left her home and responded to the prior radio call.

Delagol reported further that the next day, he informed his immediate superior, Sergeant N[redacted] D[redacted], as to what had occurred with MH. According to Delagol, he understood that by doing so, D[redacted] would be required to report this information up the chain of command.[4]

As a consequence of Mullen's investigation, the Department, on April 8, 2013, charged Delagol with the offenses at issue; namely, violations of Section 1-§018-10 (Conduct Unbecoming – Sexual behavior while on duty) and Section 5-§006-10 (Neglect

[4] Mullen's report, which includes interviews with D[redacted], Captain K[redacted] O[redacted], [redacted] of the Canine Unit, and Captain J[redacted] D[redacted], [redacted] of the Special Victims Unit, reflects that Delagol made this report to D[redacted], who, in turn, relayed it up the chain of command. (City Exhibit 1.)

of Duty – Failure to conduct a proper, thorough and complete investigation). (Joint Exhibit 2.)

Thereafter, effective June 6, 2013, the Department discharged Delagol by a Commissioner's Direct Action. Commissioner Charles Ramsey testified that after reviewing the charges and the report of Mullen's investigation, he concluded that discharge was the appropriate penalty. He explained that engaging in sexual behavior while on duty is a very serious offense, which in this case was exacerbated by the surrounding circumstances. In this regard, he stated that Delagol's conclusion that MH was not fit to drive raised doubts that she could have consented to have sex with a total stranger. He also cited Delagol's additional offense of failing to document the stop. On this basis, he concluded that Delagol had breached his duty as a police officer to protect the public, and could no longer be trusted to fulfill that responsibility.

Delagol's discharge prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on February 3, 2015, at the offices of the American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer Barry Delagol, effective June 7, 2013?

2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Delagol was for just cause. It maintains that the evidence conclusively demonstrates he is guilty of the charged offenses, which have been conceded, and discharge was warranted.

It points out that under the Department's Disciplinary Code, the penalty range for a first offense of sexual behavior while on duty is either a thirty-day suspension or dismissal. It maintains that dismissal was the appropriate response here for several reasons.

First, it argues that on the evidence presented, the appropriate penalty for Delagol's other established offense (i.e., the failure to document the stop and transport of MH) should be the high-end of the penalty range prescribed in the Department's Disciplinary Code (i.e., ten-day suspension). Therefore, it concludes, when the penalty for that offense is combined with the minimum penalty for sexual behavior while on duty (i.e., thirty-day suspension), the maximum allowable suspension is exceeded, and, as such, discharge is compelled.

Second, it contends that even without consideration of the failure to document offense, discharge is warranted here under the established facts. A police officer's job, it explains, requires making difficult decisions on a daily basis. It argues that Delagol has

shown by his conduct here to be incapable of making the correct choices when called upon to do so. It points out that by Delagol's own account, he chose to have sex with MH despite having concluded that she was not capable of driving safely, from which it necessarily follows that she also lacked the capacity to consent to sexual relations. Moreover, it stresses that under any circumstances, Delagol, as a police officer, should have known better not to engage in sexual conduct with the subject of a traffic stop. By electing to do so, he demonstrated that he is not qualified to be entrusted with the authority of a police officer.

Accordingly, for all these reasons, it submits that Delagol's discharge should be sustained and the grievance denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Delagol. Although it does not dispute that Delagol committed the charged offenses, it maintains that on the facts established, dismissal is not warranted.

It highlights that the record shows a one-time grievous error by Delagol, a fifteen-year veteran with no record of prior discipline. In addition, it points out that the next day, he self-reported this conduct to his immediate supervisor.

It argues further that the City, in attempting to justify Delagol's discharge, relies upon facts not in evidence; namely, MH's mental state. Citing Commissioner Ramsey's testimony, it notes that he placed significant weight on this factor, concluding that if she lacked the ability to drive due to her drinking, she also was lacked the capacity to consent to sexual relations with Delagol. Yet, it stresses, the City failed to present any evidence confirming her level of intoxication. As such, it concludes, Commissioner Ramsey's reliance on this factor is flawed.

It also reasons that Commissioner Ramsey's selection of penalty here was arbitrary as a matter of process. In support, it references the Commissioner's acknowledgement that in choosing dismissal over suspension, he employed no defined formula, nor relied upon any objective factors. Instead, it concludes, his determination involved a highly subjective judgment call that contravenes basic due process requirements.

Finally, it stresses that there is an absence of any exacerbating facts. Delagol, it cites, made no effort to conceal his interaction with MH, or to cover up his misconduct. To the contrary, he self-reported the matter to his immediate superior the next day.

Accordingly, for these reasons, it asserts that the City has failed establish just cause for Delagol's discharge. As such, it maintains that the grievance should be granted and the requested relief be awarded.

Opinion

In a discharge case, the employer carries the burden of proof. It must establish that the employee is guilty of the charged offenses through the weight of the credible evidence. In addition, it must also prove that the level of discipline imposed is appropriate.

Here, there is no dispute that Delagol committed the charged offenses. Indeed, he self-reported his misconduct to D[redacted]and gave a subsequent statement to IAD confirming that had engaged in sexual relations with MH while on duty on September 30, 2012, and failed to document or report stopping her vehicle and transporting her home in his patrol car. He repeated these admissions in his testimony at the hearing in this case. As such, the only issue for me to decide is whether his misconduct warranted discharge.

After a careful review of the evidence and thorough consideration of the parties' arguments, I am convinced that the record substantiates that dismissal was an appropriate response to Delagol's misconduct.[5] My reasons for this conclusion follow.

There can be no dispute that engaging in sexual behavior while on duty is a very serious offense that calls for substantial discipline. The City has made this fact clear inasmuch as the Department's Disciplinary Code sets the penalty for a first offense at a thirty-day suspension or dismissal. Likewise, the Union does not challenge the gravity of the offense, but argues only that under the circumstances here, Delagol should have received the lesser penalty of a thirty-day suspension.

I am persuaded by the Union's argument that on the record established, the City cannot properly cite MH's inability to consent to sexual relations as an exacerbating factor to support Delagol's discharge. No evidence was presented confirming the level of alcohol in MH's system at the time Delagol engaged in sexual relations with her. Delagol's decision that she should not continue driving following the vehicle stop is insufficient to demonstrate that she lacked the capacity to consent to sexual relations.

Nonetheless, based upon the totality of the circumstances here, I am convinced that Delagol's offense was sufficiently egregious to support discharge. In this regard, I take note that he engaged in sexual behavior with a person he had encountered in performing his official duties; namely, the subject of a vehicle stop. In addition, the

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[5] In reaching this decision, I have considered only the offense of sexual behavior while on duty. I am not persuaded that the other charged offense (i.e., failure to conduct a proper, thorough and complete investigation) is relevant to this determination. Under the Department's Disciplinary Code, this latter offense carries a first offense penalty of only a reprimand to a 10-day suspension. Further, the City did not establish a sufficient connection between these two offenses to support their being considered together in terms of the penalty to be imposed. Stated otherwise, the evidence presented does not support the conclusion that Delagol's failure to document stopping MH's vehicle and transporting her home in his patrol car was interrelated with his engaging in sexual relations with her. Any suggestion to the contrary is purely speculative.

sexual behavior resulted after he assumed the additional professional responsibility of driving MH to her residence. In doing so, his sole obligation was to safely transport her home. By engaging in sexual relations with MH after arriving at her residence, Delagol committed a gross breach of his duties as a police officer, which, in turn, created a grave appearance of impropriety.

In sum, his conduct was inexcusable. He had no right to engage in sexual activity while on duty under any circumstances. That is true whether or not MH initiated their sexual encounter. He remains responsible for his own actions.

In reaching this decision, I am mindful of Delagol's fifteen years of unblemished service to the Department, as well as his self-reporting of the misconduct at issue here. However, in view of the gravity of his offense, I do not find those facts provide a sufficient basis to mitigate the penalty of dismissal. In sum, I cannot conclude on the record here that his discharge constituted an excessive response to his established misconduct.

Accordingly, for all these reasons, the Union's grievance is denied.

AWARD

1. The City had just cause to discharge Barry Delagol, effective June 7, 2013.

2. The Union's grievance is denied.

February 26, 2015

David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

February 26, 2015

David J. Reilly, Esq.
Arbitrator